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10/800,566	03/15/2004	Frank Semersky	GRM63BUSA	9823
26694	7590	11/17/2006	EXAMINER	
VENABLE LLP			HARMON, CHRISTOPHER R	
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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/800,566
Filing Date: March 15, 2004
Appellant(s): SEMERSKY ET AL.

Kavita B. Lepping
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 9/12/06 appealing from the Office action
mailed 1/11/06.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5,887,739	Prevot	3-1999
5,908,128	Krishnakumar	6-1999

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 3-21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Prevot et al (#5,887,739) in view of Krishnakumar et al (#5,908,128).

Prevot et al substantially show the claimed subject matter including selecting a blow-molded PET container having a sidewall with a sidewall 20, base 18, dome 12 with a wide-mouth opening with an upper label bumper 24 and lower label bumper 22; see figure 1. This container is designed for resistance to ovalization and increased structural strength. Prevot discloses hot filling consumer goods, such as, pickles, applesauce and like food products (col 1 lines 9+). Prevot also discloses that the hot-fill process comprises filling containers with a food at an elevated temperature, sealing the containers and then cooling the containers (col 1 lines 32+). Prevot appears to disclose that the filling is done with a container that has not been heated so it appears that the container is at ambient temperature prior to filling. (col 1 lines 32).

Prevot does not disclose further pasteurizing the filled and capped container or show some of the particulars of the container, such as, vertically spaced grooves in a sidewall, a footed base or crystallinity in excess of 25%. However, Krishnakumar et al. teaches hot filling in combination with pasteurizing a filled container with vertically

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spaced grooves 137, 139; a footed base 143 so that the plastic container is able to withstand pasteurization to gain the advantages of plastic over glass (col 1 lines 42+). Krishnakumar also discloses the container has an average crystallinity of up to 30% (col 7 lines 1+).

It would have been obvious to one of ordinary skill in the art at the time of the invention to further pasteurize the hot filled container of Prevot and include vertical grooves and a footed base as well as the crystallinity as claimed as taught by Krishnakumar et al. in order to insure against contamination of the product. Note both hot filling and pasteurization are used for this purpose and well known methods of food packaging to one of ordinary skill.

Regarding the dimensions of claims 20-21, Prevot discloses a 50% opening to sidewall diameter ratio, however states that the dimensions are "By way of example, and not by way of limitation" (column 4, lines 60+) thereby suggests variation. Krishnakumar teaches a wide-mouth opening of at least about 80% of the side wall cross section. It would have been obvious to one of ordinary skill in the art to use the dimension ratio as taught by Krishnakumar in order to construct a wide-mouth container retaining the desired properties. Regarding certain temperature ranges or time intervals as claimed, the examiner notes that appellant's specification on p. 7 lines 20+ discloses the common pasteurization temperatures to be in the range of 195-210 F for 10 to 20 minutes. The examiner also notes that optimum ranges via experimentation are within the realm of ordinary skill in the art. See *in re Aller*, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955).

(10) Response to Argument

Appellant's arguments filed 9/12/06 have been fully considered but they are not persuasive.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

The differences between the prior art and the claims at issue are thus: Prevot discloses a container similar to appellant's claimed structural specifications, ie. wide mouth container with structural components, for and a process for hot filling the container with a similar product, but does not specify a pasteurization process as claimed. Krishnakumar discloses both hot filling and pasteurizing containers with similar structural elements for maintaining structural integrity except for a dimensioned wide mouth as claimed. One of ordinary skill in the art of food packaging would be capable of recognizing the benefit of increased product sterility and shelf-life by incorporating a pasteurization process and vertically spaced grooves for allowing flexibility and structural integrity to the container and/or label presentation. Furthermore, note that one of ordinary skill would be able to package food products by a known method in containers of differing dimensions as desired.

In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, both Prevot and Krishnakumar are concerned with contamination of food products and therefore provide heat during the packaging process. The invention to Prevot allows for heating and cooling of the container in the hot filling process. Prevot is concerned directly with structural aspects of a container allowing for substantial heating and cooling of the container while retaining its strength and recognizes the use of vacuum flex panels; see column 1, lines 36-42. The addition of a known structure and composition as provided by Krishnakumar to a wide-mouth container, as provided by Prevot, is readily available to one of ordinary skill in the art. One of ordinary skill would further be capable of using known packaging processes for insuring against contamination.

Applicant claims that it is erroneous to assume that containers that withstand the temperatures of a hot filling process are not able to withstand pasteurization. That assumption is not being made. Krishnakumar provides a direct teaching of containers withstanding both hot filling and pasteurization. Appellant's own specification on p. 7 lines 20+ admits the common pasteurization temperatures to be in the range of 195-210 F for 10 to 20 minutes:

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

Methods of insuring against contamination and filling of containers can be applied to many structurally different containers. Appellant seems to be relying upon the structure of the claimed container as the novelty of the process. The structure of the container does not substantially affect the filling and pasteurization processes and it is the examiner's position that both containers of Prevot and Krishnakumar are capable of withstanding the heating/cooling of both while retaining structural integrity due to the similar exposure to higher temperatures and design of each container for added structural flexibility while maintaining its integrity.

Regarding claims 6, 12, and 15, see above.

Regarding claims 20-21, Prevot discloses a wide mouth opening about 80 percent of the diameter of the cross section at a panel. Note that during patent examination, the pending claims must be interpreted as broadly as their terms reasonably allow. *In re Zletz*, 893 F.2d 319, 321, 13 USPQ2d 320,322 (Fed. Cir. 1999). In determining the patentability of claims, the PTO gives claim language its broadest reasonable interpretation" consistent with the specification and claims. *In re Morris*, 127 F.3d 1048, 1054, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997). See MPEP § 904.1.

Regarding claim 9, both Prevot and Krishnakumar disclose the use of vacuum panels in the sidewalls separated by stiffened portions resistant to distortion. The term "ovalization" is considered distortion and thus is directly taught by Prevot.

Regarding claim 10, the base of Krishnakumar is considered a footed base as it provides a recessed portion and an extension.

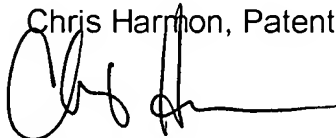
(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Chris Harmon, Patent Examiner



Conferees:

Rinaldi Rada, Supervisory Patent Examiner



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